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No. 79-1858

# In the Supreme Court of the United States

OCTOBER TERM, 1979

OSBAN CASTON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### QUESTIONS PRESENTED

1. Whether petitioner is entitled to vacation of his guilty plea because of defects in the plea proceeding.

2. Whether consecutive sentences may be imposed for transporting a stolen motor vehicle in interstate commerce, in violation of 18 U.S.C. 2312, and for concealing, bartering, selling or disposing of the same vehicle, in violation of 18 U.S.C. 2313.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 615 F. 2d 1111.

## JURISDICTION

The judgment of the court of appeals was entered on April 24, 1980. The petition for a writ of certiorari was filed on May 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is "a professional car thief" (Pet. App. 4a). While on parole, he became involved in a scheme in which cars that had been stolen in the Chicago area were transported and sold in Georgia and Texas. Petitioner was subsequently charged under 18 U.S.C. 2312-2314 in a 12-count indictment in the United States District Court for the Northern District of Georgia and in a five-count indictment in the United States District Court for the Northern District of Texas. After the Texas case was transferred to the Northern District of Georgia (see Fed. R. Crim. P. 20), petitioner pleaded guilty, pursuant to a plea agreement, to seven counts of interstate transportation of stolen motor vehicles, in violation of 18 U.S.C. 2312, and two counts of concealing or disposing of stolen motor vehicles, in violation of 18 U.S.C. 2313; the remaining counts were dismissed in accordance with the agreement. Petitioner was sentenced to a total term of 30 years' imprisonment (Pet. App. 4a-5a).

Apparently dissatisfied with "the way his plea bargain turned out" (Pet. App. 5a), petitioner appealed his conviction. The court of appeals affirmed (Pet. App. 1a-14a), rejecting petitioner's contentions that his guilty plea should be vacated because of defects in the plea proceeding under Fed. R. Crim. P. 11 and that

consecutive sentences were improperly imposed for interstate transportation of a stolen vehicle (18 U.S.C. 2312) and sale or concealment of the same vehicle (18 U.S.C. 2313).

2. At the Rule 11 hearing, the district court personally addressed petitioner as follows (Pet. App. 6a-7a n.2):

THE COURT: Mr. Caston, let me ask you a few questions. You are fully aware and familiar with the charges against you in both of these indictments?

MR. CASTON: Yes, sir.

THE COURT: Have you discussed them with your attorney, Mr. Hirsch?

MR. CASTON: Yes, sir.

* * * * *

THE COURT: And you want us to dispose of it here on this plea of guilty?

MR. CASTON: Yes, sir.

THE COURT: Are you thoroughly familiar with the nature and consequences of a plea of guilty in these cases should I accept it?

MR. CASTON: Yes, sir.

THE COURT: You understand that if I accept your plea of guilty you don't get a trial?

MR. CASTON: Right. I know it.

THE COURT: You understand that you waive your presumption of innocence and all your constitutional protections, and all that you get is a sentence?

MR. CASTON: Yes, sir.

THE COURT: You understand?

MR. CASTON: Yes, sir.

THE COURT: And you still wish to plead guilty?

MR. CASTON: Yes, sir.

THE COURT: And you understand that the maximum sentence I might impose on each count of these indictments is imprisonment of five years or a thousand dollars fine or both, on each of them?

MR. CASTON: Yes, sir.

THE COURT: And how many counts are there, all told? Six or seven?

MR. HIRSCH: Six on the indictment from here, Your Honor; and three on the other.

THE COURT: Nine counts.

So, that would be a total of forty-five thousand dollars or forty-five years maximum. Do you understand that?

MR. CASTON: Yes, sir.

THE COURT: And you still wish to plead guilty?

MR. CASTON: Yes, sir.

THE COURT: Well, are you in fact guilty?

MR. CASTON: Yes.

THE COURT: Tell us a little bit about what happened.

MR. CASTON: Well, I don't know, some guys came down here with some cars and got caught with them and they said I helped bring them down here, said I sent them down here.

THE COURT: Well, you're charged with transporting across state lines, or concealing?

MISS CARNES: Both, Your Honor.

MR. HIRSCH: Both, Your Honor.

MISS CARNES: Both.

THE COURT: Well, did you know these cars were stolen?

MR. CASTON: Yes, sir.

THE COURT: And did you help them conceal them or transport them or dispose of them?

MR. CASTON: Yes.

THE COURT: So, you're guilty as charged?

MR. CASTON: Yes, sir.

Similarly, before passing sentence, the district court again questioned petitioner (Pet. App. 7a-8a n.2):

THE COURT: Are you thoroughly familiar with the nature of the charges pending against you?

MR. CASTON: Yes, sir.

THE COURT: There are nine counts here in two separate indictments of interstate transportation of stolen automobiles. You're familiar with that?

MR. CASTON: Yes, sir.

THE COURT: That's the ones you pled guilty to, and there's an agreement that some others are to be dropped?

MR. CASTON: Yes, sir.

THE COURT: Now, are you also thoroughly familiar with the nature and the consequences of a plea of guilty to these nine counts if I accept your plea of guilty?

MR. CASTON: Yes, sir.

THE COURT: You know what the consequences and effect of that are?

MR. CASTON: Yes, sir.

THE COURT: You understand that if I accept these pleas of guilty, you don't get a trial?

MR. CASTON: Yes, sir.

THE COURT: You do not get the right to confront the witnesses against you; you waive your presumption of innocence—

MR. CASTON: Yes, sir.

THE COURT: —and surrender all of your other constitutional protections?

In fact, all you get on a plea of guilty to these nine counts is a sentence on each one of them. Do you understand that?

MR. CASTON: Yes, sir.

THE COURT: Do you understand that the maximum penalty I might impose is five years in prison or five thousand dollars fine on each of these nine counts?

MR. CASTON: Yes, sir.

THE COURT: Well, now, and you still wish to plead guilty?

MR. CASTON: Yes, sir.

THE COURT: Well, are you in fact guilty?

MR. CASTON: Yes, sir.

THE COURT: In all nine instances?

MR. CASTON: Yes, sir.

THE COURT: What were you in, an automobile theft ring of some sort, as charged, set out in the presentence report?

MR. CASTON: Yes, sir.

* * * * *

THE COURT: Has anybody promised you anything in the way of leniency or recommendations or anything of any character whatsoever—

MR. CASTON: No, sir.

THE COURT: —to cause you to enter these pleas?

MR. CASTON: No, sir.

THE COURT: Or tender these pleas?

MR. CASTON: No, sir.

THE COURT: Do you enter them freely and voluntarily, of your own free will and accord?

MR. CASTON: Yes, sir.

THE COURT: All right. I'll accept your plea of guilty to the nine counts involved.

## ARGUMENT

1. Although not claiming that his guilty plea was constitutionally invalid, petitioner asserts that his plea should be vacated because the district court failed to

comply with the requirements of Fed. R. Crim. P. 11.[1] Petitioner argues for a *per se* rule of reversal for Rule 11 violations even where, as here, there is no allegation that a defendant's substantial rights were prejudicially affected or that his decision to plead guilty might have been altered by punctilious compliance with the Rule.

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[1]The present version of Fed. R. Crim. P. 11 provides in pertinent part:

> (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
>
> (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and
>
> (5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.
>
> (d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also

a. Without citation to the specific provisions of Rule 11, petitioner first complains (Pet. 16) that the district court failed to advise him about "his attorney['s] * * * right to summon witnesses on [his] behalf" at trial or about "proof beyond a reasonable doubt [and] the opportunity to have an unbiased jury, properly instructed, with the benefit of closing arguments by his own attorney to adjudicate guilty [*sic*] *vel non*." However, Rule 11 nowhere provides that such advice be given.[2] Petitioner has offered no reason or authority to support the establishment of these additional prerequisites that are not required by either Rule 11 or the Constitution.

b. Petitioner next argues (Pet. 17-18) that he was not fully informed of "the nature of the charge to which the plea [was] offered" (Fed. R. Crim. P. 11(c)(1)) because the district court failed to explain the aiding and abetting statute (18 U.S.C. 2). However, aiding and abetting is not itself a separate substantive offense, and indeed it need not be charged in the indictment in order to convict an accessory as a principal. See, *e.g.*, *United States* v. *Maselli*, 534 F. 2d 1197, 1200 (6th Cir. 1976); *United*

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inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

* * * * *

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

[2]The Advisory Committee's Notes on the 1974 amendments to Rule 11 state that "a defendant's right to have his guilt proved beyond a reasonable doubt * * * [is] best explained by indicating that the right to trial is waived. * * * In explaining to a defendant that he waives his right to trial, the judge *may want to explain* some of the aspects of trial such as the right * * * to subpoena witnesses * * *" (emphasis added).

*States* v. *Taylor*, 464 F. 2d 240, 242 n.1 (2d Cir. 1972); *United States* v. *Sannicandro*, 434 F. 2d 321, 324 (9th Cir. 1970); *United States* v. *Lugo-Baez*, 412 F. 2d 435, 440 (8th Cir. 1969), cert. denied, 397 U.S. 966 (1970). Accordingly, Rule 11(c)(1) does not require the district court to engage in a detailed explanation of the aiding and abetting statute during the plea hearing.

In the instant case, the court determined that petitioner understood the charges against him, that petitioner had been involved in "an automobile theft ring[,]" and that petitioner had "helped" conceal, transport, and dispose of cars that he knew were stolen (see pages 2-6, *supra*). In addition, the court correctly advised petitioner of the maximum penalty provided by law on each count. This procedure adequately apprised petitioner of the nature of the charges to which his plea was offered and the penal personal consequences of the plea.

c. Petitioner lastly contends (Pet. 16-18) that his guilty plea should be vacated on the ground that the district court failed to advise him of "the right not to be compelled to incriminate himself" at trial (Fed. R. Crim. P. 11(c)(3)). While we agree that the court deviated from Rule 11 in this regard, we do not believe that vacation of petitioner's plea is warranted.

As the court of appeals described (Pet. 10a), the district court substantially complied with the requirements of Rule 11. Petitioner raises no claim that his plea was constitutionally defective because it was not voluntarily and intelligently made. Nor does petitioner—"an experienced defendant * * * who was actively represented by counsel during the plea proceedings" (*ibid.*)—allege that he was prejudiced by this departure from Rule 11; indeed, he "does not contend that he was unaware of his right[] * * * against self-incrimination * * * [and he] does

not suggest that he was unaware that a guilty plea necessarily waived [that] right[]" (*id.* at 11a-12a n.4). In these circumstances, the court of appeals properly concluded (*id.* at 12a) that this failure to comply with Rule 11 "was harmless beyond a reasonable doubt and does not merit reversal" even under the strict harmless-error standard of *Chapman* v. *California,* 386 U.S. 18, 21-22 (1967).

Petitioner asserts, however, that all Rule 11 violations are *per se* reversible error. In our view, neither Rule 11 itself nor the Court's decision in *McCarthy* v. *United States,* 394 U.S. 459 (1969), requires that the Rule barring reversal for harmless error (Fed. R. Crim. P. 52(a)) be inapplicable to plea proceedings or that a technical, non-prejudicial violation of the current version of Rule 11 necessitates the automatic reversal on direct appeal of a guilty plea that is voluntary, intelligent, and factually accurate. In *McCarthy,* the Court invoked its supervisory powers to hold that a guilty plea would automatically be invalidated on direct appeal if the district court had acted "without fully adhering to the procedure provided for in Rule 11" (394 U.S. at 464).[3] *McCarthy* was "based solely upon * * * [a] construction of Rule 11" (*ibid.*), a provision that was substantially amended in 1974 to its present form (see note 1, *supra*).[4] See also *Halliday* v. *United States,* 394 U.S. 831, 832 (1969) ("*McCarthy* * * *

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[3]In *United States* v. *Timmreck,* 441 U.S. 780 (1979), the Court held that a technical, non-prejudicial violation of Rule 11 would not support a collateral attack on a guilty plea.

[4]At the time of the *McCarthy* decision, Rule 11 read as follows:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding

took care to note that our holding was based solely upon the application of Rule 11 and not upon constitutional grounds"). Under the revised, more detailed version of Rule 11, we submit that automatic reversal is inappropriate where a district court inadvertently commits a formal, non-prejudicial error in a plea proceeding.

The courts of appeals are divided on the question whether a technical violation of amended Rule 11 that does not affect the defendant's substantial rights necessarily requires reversal of a guilty plea on direct appeal.[5] Nevertheless, this Court has recently declined to review the issue. See *United States* v. *Gray*, 611 F. 2d 194

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of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

[5]The Fifth, Eighth and Ninth Circuits have not adopted a standard of automatic reversal. See *United States* v. *Dayton*, 604 F. 2d 931 (5th Cir. 1979) (en banc), cert. denied, No. 79-944 (Feb. 25, 1980); *United States* v. *Cammisano*, 599 F. 2d 851, 855 (8th Cir. 1979); *United States* v. *Scharf*, 551 F. 2d 1124, 1129-1130 (8th Cir.), cert. denied, 434 U.S. 824 (1977); *United States* v. *Lambros*, 544 F. 2d 962 (8th Cir. 1976), cert. denied, 430 U.S. 930 (1977); *United States* v. *Conrad*, 598 F. 2d 506 (9th Cir. 1979). On the other hand, some circuits have imposed an "automatic reversal" rule. See *United States* v. *Gray*, 611 F. 2d 194 (7th Cir. 1979), cert. denied, No. 79-6057 (Apr. 21, 1980); *United States* v. *Fels*, 599 F. 2d 142, 149 n.5 (7th Cir. 1979); *United States* v. *White*, 583 F. 2d 819, 824 (6th Cir. 1978); *United States* v. *Boone*, 543 F. 2d 1090, 1092 (4th Cir. 1976). The Second Circuit has taken conflicting positions on the issue. Compare *United States* v. *Michaelson*, 552 F. 2d 472 (2d Cir. 1977), and *United States* v. *Saft*, 558 F. 2d 1073 (2d Cir. 1977), with *United States* v. *Palter*, 575 F. 2d 1050 (2d Cir. 1978), and *United States* v. *Journet*, 544 F. 2d 633, 635 (2d Cir. 1976). The Third Circuit, sitting en banc, recently considered the issue, but was evenly divided and affirmed without opinion. *United States* v. *Altro*, 612 F. 2d 575 (3d Cir. 1979) (table), cert. denied, No. 79-5892 (Mar. 17, 1980); see also

(7th Cir. 1979), cert. denied, No. 79-6057 (Apr. 21, 1980); *United States* v. *Dayton*, 604 F. 2d 931 (5th Cir. 1979) (en banc), cert. denied, No. 79-944 (Feb. 25, 1980); *United States* v. *Altro*, 612 F. 2d 575 (3d Cir. 1979) (en banc) (table), cert. denied, No. 79-5892 (Mar. 17, 1980). Moreover, the conflict may be resolved in the near future by a proposed amendment to Rule 11:

> (*h*) *HARMLESS ERROR.* Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure*, 85 F.R.D. 379, 387 (1979).[6] In November 1979, the proposed amendment was circulated for comment by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States (*id.* at 382-383). If adopted, this amendment would resolve the conflict, and the question presented in the petition would no longer be of continuing public importance. Accordingly, we do not believe there is any need for the Court to review the issue at this time.

2. Petitioner also claims (Pet. 18-23) that it violated double jeopardy to impose consecutive sentences for the interstate transportation of a stolen vehicle (18 U.S.C.

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*United States* v. *Carter*, 619 F. 2d 293, 294, 295 n.9, 299 (3d Cir. 1980). Previously, the Third Circuit had followed the "automatic reversal" rule. See *United States* v. *Keller*, 594 F. 2d 939, 942 (3d Cir. 1979); but see *United States* v. *Dawkins*, 448 F. Supp. 1343 (E.D. Pa.), aff'd, 577 F. 2d 729 (3d Cir. 1978) (table).

[6]The Advisory Committee's Note indicates that proposed Rule 11(h) is a clarifying amendment and that a harmless-error standard is appropriate under the existing Rule. See 85 F.R.D. at 397, 400.

2312) and the concealment, sale or disposition of the same vehicle (18 U.S.C. 2313).[7] The court of appeals correctly rejected this contention (Pet. App. 13a-14a).

Petitioner's assertion rests on his view that "the overall conduct was, in reality, but a single offense" (Pet. 19). Even accepting petitioner's characterization of the underlying course of conduct, however, the imposition of consecutive sentences does not offend the Double Jeopardy Clause. See, *e.g., Gore* v. *United States,* 357 U.S. 386 (1958). "[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized. * * * The dispositive question, therefore, is whether Congress did * * * provide [for cumulative punishments]." *Whalen* v. *United States,* No. 78-5471 (Apr. 16, 1980), slip op. 3-4. See also *Busic* v. *United States,* No. 78-6020 (May 19, 1980), slip op. 2 (Blackmun, J., concurring).

In *Blockburger* v. *United States,* 284 U.S. 299 (1932), the Court set forth the general standard "to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively * * * [:] 'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied * * * is whether each provision requires proof of a fact which the other does not' " (*Whalen* v. *United States, supra,* slip op. 7, quoting 284 U.S. at 304). Here, it is manifest that Sections 2312 and 2313 each entail proof of distinct facts. Under Section 2312, the government

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[7]Petitioner received consecutive five-year sentences both on counts one and two of the Georgia indictment (involving a 1977 Chevrolet Corvette) and on counts four and five of that indictment (pertaining to a 1977 Lincoln Town Car).

must establish that the defendant transported the vehicle in interstate commerce, while Section 2313 does not prescribe such proof of the defendant's participation; on the other hand, an element of Section 2313, but not of Section 2312, is that the defendant conceal, sell or dispose of the stolen vehicle. In line with this analysis, the courts of appeals have uniformly held that the Double Jeopardy Clause does not bar cumulative punishments pursuant to Sections 2312 and 2313. See, *e.g.*, *United States* v. *Sanders*, 538 F. 2d 695 (5th Cir.), cert. denied, 429 U.S. 985 (1976); *United States* v. *Neighbors*, 515 F. 2d 796, 797 (8th Cir. 1975); *United States* v. *Ploof*, 464 F. 2d 116, 119-120 (2d Cir.), cert. denied, 409 U.S. 952 (1972); *United States* v. *Thompson*, 442 F. 2d 1333, 1334 (6th Cir. 1971); *United States* v. *Lankford*, 296 F. 2d 34, 36 (4th Cir. 1961); *Woody* v. *United States*, 258 F. 2d 535, 536 (6th Cir. 1957), aff'd per curiam by an equally divided Court, 359 U.S. 118 (1959); *Madsen* v. *United States*, 165 F. 2d 507, 510 (10th Cir. 1947).[8]

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[8]Petitioner has pointed to nothing in the language, purpose or history of Sections 2312 and 2313 to suggest that, notwithstanding the fact that the *Blockburger* test is satisfied, Congress intended not to authorize cumulative punishments. See *Whalen* v. *United States*, *supra*, slip op. 7. To the contrary, as noted above, the courts of appeals have unanimously concluded that the statutes permit consecutive sentences to be imposed.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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